

No. 13-0336 BN

We grant in part and deny in part the motion for summary decision filed by the State Board of Nursing (“the Board”).

The Board filed a complaint with this Commission on February 19, 2013 seeking to discipline Heather Stritzel's practical nursing license. Stritzel was served with a copy of the complaint and our notice of complaint/notice of hearing on March 22, 2013. On April 18, 2013, the Board received a letter from Stritzel in which she made a general denial of the allegations contained in the complaint, but she failed to file it with this Commission as her answer. On May 13, 2013, the Board filed a motion for a default decision. Stritzel then filed her answer with this Commission, on May 28, 2013. We denied the motion for default on May 29, 2013.

On May 31, 2013, the Board served a request for admissions on Stritzel. Kevin J. Dolley entered his appearance on Stritzel's behalf on June 13, 2013 and replied to the Board's request for admissions on July 19, 2013. After four continuances, the case was set for hearing on February 13, 2015. The Board pre-filed its exhibits on February 6, 2015, but Stritzel filed a motion for a continuance on February 10, 2015, which we granted. The Board filed an intervening motion for summary decision on February 18, 2015. Stritzel responded to the motion on March 11, 2015.

Pursuant to 1 CSR 15-3.446(6)(A),¹ we may decide a motion for summary decision if a party establishes facts that entitle that party to a favorable decision and no party genuinely disputes such facts. Those facts may be established by stipulation, pleading or discovery response of the adverse party, affidavit, or other evidence admissible under the law. 1 CSR 15-3.446(6)(B). As the non-moving party, Stritzel has the burden to raise a genuine issue as to any of the essential facts that would otherwise entitle the Board to a favorable decision. *Id.*

In support of the motion for summary decision, the Board offered a blank copy of its request for admissions directed to Stritzel, which she did not answer within 30 days. The Board asks that we deem Stritzel's initial failure to timely respond as deemed admissions on her part and grounds for conclusively establishing all matters on which the Board sought those admissions. Stritzel argues that she was acting *pro se* at the time the Board sought the admissions and that the request for admissions did not include the compulsory warning, set forth in Supreme Court Rule 59.01(a), that failure to respond would result in deemed admission of each matter in its request.

Stritzel is correct that the Board's request for admissions was technically deficient. Pursuant to Rule 59.01(b), we permit her belated response as an amendment to any deemed

¹All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

admissions she may have made when she did not timely answer. We find that the presentation of the merits will be subserved thereby, and that the amendment will not prejudice the Board in prosecuting its case on the merits.

Alternatively, the Board offered Stritzel's objections and replies to the request for admissions as another exhibit to the motion as a basis for finding facts sufficient to support a summary decision under our standards.

In response to the motion, Stritzel presented an affidavit raising several issues of material fact related to whether discipline of her license is warranted under the provisions alleged as grounds by the Board. The Board did not request, and Stritzel did not otherwise make, any admissions regarding the legal bases on which the Board seeks authority to impose discipline. We consider Stritzel's admissions and her affidavit in order to determine whether uncontroverted facts have been established that entitle the Board to summary decision.

We note that Stritzel has made two procedural arguments she claims preclude summary decision in this case. First, she points to the general objections with which she prefaced the admissions, including that the requests were unduly burdensome and overbroad. Thus, she claims that "there is genuine uncertainty as to the substance, scope, and effect" of her responses.

Having reviewed those general objections, we find that none of them pertain to the requests she admitted subject thereto, and we overrule them. Under Rule 59.01(d), the responding party has four choices as to how to respond to each request for admission: the party must specifically admit, deny, object to, or provide reasons why the party cannot truthfully admit or deny each matter. Pursuant to that rule, Stritzel admitted certain facts and denied others. We rely on those responses.

Second, Stritzel attacks the Board's motion as procedurally defective, and fatally so, because it does not adhere to the requirements in Supreme Court Rule 74.04 governing summary

judgment practice in civil matters. The Missouri Supreme Court's rules for civil actions in circuit court have no force of law before this Commission, *Dillon v. Director of Revenue*, 777 S.W.2d 326, 329 (Mo. App. W.D. 1989), except as the legislature specifically incorporates them by reference. *Wheeler v. Board of Police Comm'rs*, 918 S.W.2d 800, 803 (Mo. App. W.D. 1996). Instead, our summary decision regulation 1 CSR 15-3.446(6)(B) controls here and provides only that a party “*may* meet the requirements for the content of a motion, or for a response to a motion, under section (6) of this rule by complying” with that rule. The suggested content of a motion for summary decision, by reference to Rule 74.04, is merely advisory.

Findings of Fact for Purposes of This Order

Stritzel's Admissions

1. Stritzel is licensed by the Board as a licensed practical nurse (LPN).
2. Stritzel worked as an LPN at Davita Healthcare St. Louis West in St. Louis County, Missouri (“Davita”) from 2000 to 2011.
3. Stritzel was terminated from her employment as an LPN with Davita.
4. In July of 2011, while working as an LPN at Davita, Stritzel called in for herself, without a physician's knowledge that she was using his DEA number, a prescription for Norco.
5. Stritzel refilled the prescription for Norco four times for herself in 2011.
6. Stritzel consumed the Norco she called in as a prescription and refilled in 2011.
7. Dr. Bruce Lippmann never gave Stritzel permission to call in the Norco prescription for herself.

Stritzel's Affidavit

8. Stritzel's dates of employment at Davita were approximately November 9, 2000 to November 16, 2011.

9. During her tenure at Davita, it was routine and accepted practice for nurses to call in medications to a pharmacy without a doctor's specific knowledge or permission as to a particular prescription.

10. Physicians at Davita allowed staff nurses, including Stritzel, discretion as to calling in prescription medications to a pharmacy without their specific knowledge or permission as to a particular prescription.

11. All prescriptions that Stritzel called in to pharmacies during her employment with Davita were called in as part of the above-described routine practice allowed by the physicians there.²

Conclusions of Law

We have jurisdiction to hear this case. Sections 335.066.2 and 621.045.³ The Board has moved for summary decision. "Summary decision, which is a procedure modeled on the summary judgment procedure at the circuit court level, is proper 'if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts.' " *Krispy Kreme Doughnut Corp. v. Dir. of Revenue*, 358 S.W.3d 48, 51 (Mo. banc 2011) (footnote omitted) (quoting 1 CSR 15–3.446(6)(A) (2011)). "[F]acts asserted in support of a motion for summary decision are taken as true unless contradicted by the non-moving party's response." *State Comm. of Marital & Family Therapists v. Haynes*, 395 S.W.3d 67, 70 (Mo.App.W.D. 2013).

The Board alleges that cause for discipline exists under § 335.066.2(1), (5), (6), (12) and (14),⁴ as follows:

² Paragraph 5 of Stritzel's affidavit goes on to state that such a routine practice was "within the scope of my practice." For reasons set forth fully in our conclusions of law, we decline to accept this statement of Stritzel's opinion as a material fact.

³ Statutory references are to RSMo Cum. Supp. 2013 unless otherwise noted.

⁴ Here, the Board has relied on RSMo Cum. Supp. 2010 – the provisions as known and numbered at the time of the conduct alleged in the Board's complaint. We do the same.

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use or unlawful possession of any controlled substance, as defined in chapter 195, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

* * *

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;

(6) Violation of, or assisting or enabling any person to violate, any provision of sections 335.011 to 335.096, or of any lawful rule or regulation adopted pursuant to sections 335.011 to 335.096;

* * *

(12) Violation of any professional trust or confidence;

* * *

(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

Unlawful Acquisition, Possession, and Use of a Controlled Substance
– Subdivisions (1), and (14)

Stritzel admits that she prescribed Norco for herself, refilled it on several occasions, and consumed it. If Norco is a controlled substance, the unlawful possession of it would be in violation of Chapter 195, even if, as Stritzel contends, the manner in which she obtained it was condoned by her employer. But while the Board contends in its complaint that Norco is a controlled substance, it has not established the truth of this allegation with admissible evidence.

Although we have taken notice of the chemical composition of trade-named pharmaceuticals in past decisions, we find no authority that such a fact may be subject to judicial notice or official notice. We may take official notice of all matters of which courts may take judicial notice under 536.070(10), and we note that courts take notice that certain chemical compounds, as described by state statute, are controlled substances. *See State v. Campbell*, 122 S.W.3d 736, 739 n.4 (Mo. App. S.D. 2004). But we have found no case in which trade names of drugs are subject to such notice. For these reasons, we conclude that the Board has not established that Stritzel's possession and consumption of Norco she ordered from a pharmacy for herself constitutes cause to discipline her license under § 335.066.2(1). And while Stritzel's conduct may violate some other drug law or regulation not related to controlled substances, the Board did not cite any in its complaint. Therefore, we also deny summary decision under § 335.066.2(14).

Violation of Nursing Law or Regulation – Subdivision (6)

Stritzel contends that it was standard practice for staff nurses at Davita to call in prescriptions without a physician's express authorization – in other words, that nurses at Davita were allowed to exercise independent prescribing authority. But even if we assume that this was standard practice at Davita, such a practice is not authorized under the statutory definition of practical nursing.

In the affidavit Stritzel provided in response to the Board's motion, she states that all prescriptions that she called in to pharmacies during her employment with Davita were called in as part of the routine practice allowed by its physicians and were within the scope of her practice. The Board argues that an LPN who calls in prescriptions not authorized by a person licensed to prescribe medications violates the Nurse Practice Act because such an action is outside the scope

of her practice as an LPN. That is described in § 335.016(14), which defines “practical nursing” as:

the performance for compensation of selected acts for the promotion of health and in the care of persons who are ill, injured, or experiencing alterations in normal health processes. Such performance requires substantial specialized skill, judgment and knowledge. **All such nursing care shall be given under the direction of a person licensed by a state regulatory board to prescribe medications and treatments or under the direction of a registered professional nurse. For the purposes of this chapter, the term “direction” shall mean guidance or supervision provided by a person licensed by a state regulatory board to prescribe medications and treatments or a registered professional nurse, including, but not limited to, oral, written, or otherwise communicated orders or directives for patient care.** When practical nursing care is delivered pursuant to the direction of a person licensed by a state regulatory board to prescribe medications and treatments or under the direction of a registered professional nurse, such care may be delivered by a licensed practical nurse without direct physical oversight[.]

(Emphasis added.)

Even though Stritzel admitted that she phoned in a prescription for Norco for herself, she argues that the Board has not made the case that doing so was unlawful because she can show that staff nurses calling in prescriptions for patients was routine and accepted practice at Davita. She claims it was not improper because the physicians and administration at Davita gave their nurses carte blanche to prescribe any medication to any patient, in the exercise of their own independent discretion. But even if we accept as true Stritzel’s contention about customary practice at Davita, that does not mean the practice was legal under the Nurse Practice Act.

Stritzel’s admissions establish that she called in prescriptions for herself without a doctor’s order to do so. Any such order she conveyed to a pharmacy was not within her legal authority as an LPN. We therefore find cause for discipline for exceeding the scope of her practice under § 335.016(14), which is cause for discipline under § 335.066.2(6).

Professional Standards – Subdivision (5)

The Board alleges that Stritzel's conduct, with respect to the falsification of prescriptions and consumption of medication not prescribed for her by a physician, constitutes misconduct, misrepresentation, fraud, and dishonesty in the performance of her functions and duties as an LPN. With only part of the Board's allegations being proven at this point, we examine whether application of the law to the uncontroverted facts gives rise to discipline under this provision.

Misconduct means "the willful doing of an act with a wrongful intention[.] intentional wrongdoing." *Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524 (Mo. App. E.D. 1988). A misrepresentation is a "falsehood or untruth made with the intent of deceit rather than an inadvertent mistake." *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W. 2d 894, 899, n. 3 (Mo. App. W.D. 1997). Fraud is defined "generally under the common law as an intentional perversion of truth to induce another, or to act in reliance upon it." *Id.* at 899 n.2. It necessarily includes dishonesty, which is a disposition to defraud, deceive or betray. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 650 (unabr. 1986). In order to be subject to discipline for any of these under § 335.066.2(5), the conduct must have been "in the performance of the functions or duties" of a nurse.

Regardless of whether physicians at Davita condoned the practice, we find that Stritzel's calling in prescriptions for Norco for herself, under the DEA number and attendant authority of any physician without that physician's actual authority, was a wrongful act made with the intention of circumventing the law and that it was fraudulent, dishonest, and misrepresentative of her actual legal authority. There is cause for discipline under § 335.066.2(5).

Violation of Professional Trust or Confidence – Subdivision (12)

The phrase “professional trust or confidence” is not defined in Chapter 335. Nor has the phrase been defined in the case law. Therefore, we again turn to the dictionary, which defines “professional” as

of, relating to, or characteristic of a profession or calling...[;]... engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency...[; and]...characterized or conforming to the technical or ethical standards of a profession or occupation....

WEBSTER’S, *Id.* AT 1811. “Trust” is

assured reliance on some person or thing [;] a confident dependence on the character, ability, strength, or truth of someone or something...[.]

Id. at 2456. “Confidence” is a synonym for “trust.” *Id.* at 475 and 2456. Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]” *Id.* at 2456. Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]” *Id.*

Therefore, we define professional trust or confidence to mean reliance on the special knowledge and skills that professional licensure evidences. We note that the Board’s allegations relate only to Stritzel’s calling in unauthorized prescriptions for herself, not for any other of Davita’s patients. Taking Stritzel’s statements about what she was permitted to do in the course and scope of her job at Davita as true, and with no other evidence before us to the contrary, we are unable to conclude that the Board has met its burden with respect to violation of a professional trust or confidence on Stritzel’s part. We therefore we deny summary decision under § 335.066.2(12).

Summary

We grant the Board's motion in part. The Board has cause to discipline Stritzel's license under § 335.066.2(5) and (6). The Board has not shown cause for discipline under § 335.066.2(1), (12) and (14). If the Board wishes to proceed to hearing on the remaining provisions, it shall inform us by April 10, 2015.

SO ORDERED on April 1, 2015.

Karen A. Winn

KAREN A. WINN
Commissioner